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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION

10 In re Apple & AT&TM Antitrust Litigation NO. C 07-05152 JW

11 **ORDER DENYING MOTION FOR**
12 **CERTIFICATION; DENYING MOTION**
13 **TO DISMISS; DENYING MOTION TO**
14 **STRIKE OR DISMISS CLASS ACTION**
15 **ALLEGATIONS**

16
17 **I. INTRODUCTION**

18 Presently before the Court are (1) Defendant Apple's Motion for Certification of
19 Interlocutory Appeal of Limited Portions of the Court's Order Granting in Part and Denying in Part
20 Apple's Motion to Dismiss (hereafter, "Motion for Certification," Docket Item No. 159); (2)
21 Defendant AT&TM's Motion to Dismiss Counts III, IV, V and VII Pursuant to Rule 12(b)(6)
(hereafter, "Motion to Dismiss," Docket Item No. 147); and (3) Defendant AT&TM's Motion to
22 Strike or Dismiss the Class Allegations (hereafter, "Motion to Strike," Docket Item No. 148).

23 The Court found it appropriate to take Defendant AT&TM's Motions under submission
24 without oral argument. See Civ. L.R. 7-1(b). On February 9, 2009, the Court conducted a hearing
25 on Defendant Apple's Motion. Based on the papers submitted to date and oral argument, the Court
26 DENIES Defendant Apple's Motion for Certification and Defendant AT&TM's Motions to Dismiss
27 and to Strike.
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II. DISCUSSION

A. Apple's Motion for Certification

Apple moves to certify portions of the Court's October 1, 2008 Order Granting in Part and Denying in Part Apple's Motion to Dismiss. (hereafter, "October 1 Order," Docket Item No. 144.)

In particular, Apple requests certification of the following three issues:

- (1) Whether Newcal Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038 (9th Cir. 2008), fundamentally altered antitrust law to hold that aftermarket power is adequately alleged, and monopolization claims can thus proceed, simply where it is alleged that a plaintiff did not knowingly and voluntarily place the defendant in a monopoly position.
- (2) Whether a product, such as cellular voice and data services, that indisputably existed long before, and independent of, a foremarket product can be considered "wholly derivative from and dependent on" that foremarket product, as required under Ikon, to support a cognizable relevant aftermarket.
- (3) Whether a company's initial entry strategy into a highly competitive primary market can give immediate rise to cognizable monopolization claims against that company in an "aftermarket" limited to that company's newly-launched product.

(Motion for Certification at 1-2.)

Pursuant to 28 U.S.C. § 1292(b), an interlocutory order should be certified for an immediate appeal if the order "involves a controlling question of law as to which there is substantial ground for difference opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation." An interlocutory appeal should only be granted if it would avoid protracted and expensive litigation. United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966); In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982).

In this case, Apple largely takes issue with the Court's application of the governing Ninth Circuit opinion in Ikon to the facts surrounding Apple and AT&TM's introduction of the iPhone. Apple contends that the Court misread the Ikon decision and, in doing so, went beyond the settled boundaries of antitrust law. In reviewing Apple's contentions, however, the Court finds that the October 1 Order was a relatively straightforward application of Ikon to the allegations presented in this case. Although Apple may be correct that the particular factual scenario before the Court

1 creates issues of first impression in the antitrust context, the Court is not persuaded that its
2 resolution of those issues fell far afield of antitrust precedent as it exists in the Ninth Circuit.

3 In addition, the Court finds that interlocutory appeal of these antitrust issues would result in
4 piecemeal treatment of this litigation. Such an appeal would only operate with respect to a subset of
5 the claims against one of the two Defendants in this action, and would not affect the numerous non-
6 antitrust claims asserted by Plaintiffs. In light of these considerations, the Court declines to permit
7 an interlocutory appeal of its October 1 Order.

8 Accordingly, the Court DENIES Apple's Motion for Certification.

9 **B. AT&TM's Motion to Dismiss**

10 AT&TM moves to dismiss Counts III, IV, and VII of Plaintiffs' Complaint, which are for
11 monopolization, attempted monopolization, and violation of the Magnuson-Moss Warranty Act,
12 respectively. The Court addresses each issue in turn.

13 **1. Monopolization and Attempted Monopolization**

14 AT&TM moves to dismiss Plaintiffs' antitrust claims relating to monopolization of the
15 alleged voice and data services aftermarket for the iPhone. Defendant contends that Plaintiffs have
16 not sufficiently alleged why other wireless networks are not interchangeable economic substitutes
17 for Defendant's network. (Motion to Dismiss at 4.)

18 First, the Court has already found that Plaintiffs sufficiently allege a relevant aftermarket in
19 iPhone voice and data services. (October 1 Order at 14-15.) Second, although the October 1 Order
20 did not expressly address whether Plaintiffs had alleged reasonably interchangeable economic
21 substitutes, the Court understood the gravamen of Plaintiffs' antitrust claims to be that the agreement
22 between Apple and AT&TM prevents there from being any reasonable economic substitutes for
23 AT&TM iPhone voice and data services. As such, the Court does not find it necessary to allege that
24 other wireless providers are, for purposes of antitrust analysis, reasonable economic substitutes.

25 Accordingly, the Court DENIES Defendant AT&TM's Motion to Dismiss Counts III and IV
26 of Plaintiffs' Complaint.

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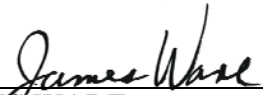
1 motion for class certification on the grounds that it fails to meet the requirements of Rule 23. A
2 motion to strike or dismiss that is itself based on Rule 23, however, is not the appropriate procedure.

3 Accordingly, the Court DENIES Defendant AT&TM's Motion to Strike or Dismiss
4 Plaintiffs' Class Allegations.

5 **III. CONCLUSION**

6 The Court DENIES Defendant Apple's Motion for Certification of Interlocutory Appeal and
7 Defendant AT&TM's Motions to Dismiss and to Strike.

8
9 Dated: March 4, 2009



JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: March 4, 2009

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy